**Beckley Appalachian Regional Hospital *and* Carol Kongkasuwan.** Case 9–CA–31051

August 31, 1995

DECISION AND ORDER

MEMBERS BROWNING, COHEN, AND TRUESDALE

On August 19, 1994, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by suspending and discharging registered nurse Carol Kongkasuwan for engaging in protected concerted activity. As explained below, we disagree and dismiss the complaint.

The facts as more fully set forth by the judge are as follows. Carol Kongkasuwan is a registered nurse at the Behavioral Science Center (BSC) at Beckley Appalachian Regional Hospital (Hospital). The Hospital's registered nurses are represented by the West Virginia Nurses Association.

On March 3, 1993,[1] Kongkasuwan was involved in an incident regarding a defective intravenous (IV) procedure. The Hospital Personnel Manager, Edna Nasby, investigated this incident and scheduled an initial disciplinary hearing for March 5. At this hearing, several other work-related incidents were discussed, including Kongkasuwan's misspelling of a drug in a report, and her untimely completion of work assignments. Following the hearing, Nasby suspended Kongkasuwan for 3 days for violating Hospital procedures.[2] Kongkasuwan appealed the suspension.

In the interim, Kongkasuwan obtained patient records from other employees to show that other nurses had committed similar work infractions without incurring discipline. Nasby became aware that Kongkasuwan had sought the aid of other employees. Nasby contacted Union President Rue Hairston, and complained that Kongkasuwan had involved other Hospital employees in her discipline case. It had been reported to Nasby that Kongkasuwan and licensed practical nurse Peggy Lester had been seen together. Nasby asked Lester who had been helping Kongkasuwan. Although not mentioned by the judge, Lester testified that Nasby told her that whoever had helped Kongkasuwan would be discharged.

At the March 16 appeal hearing, Kongkasuwan was provided with union representation. In her defense, Kongkasuwan proffered the patient records to show disparate treatment. The judge found that the internal Hospital records were confidential material. Although the names of the patients had been redacted, each patient's Hospital identification number was still visible.

Nasby demanded to know how many copies of patient records Kongkasuwan possessed, how she had obtained these documents, and who had assisted her. Kongkasuwan refused to reveal the names of the individuals who had provided the information.[3] Nasby then concluded the meeting.

By letter dated March 16, Kongkasuwan was suspended for 5 days for violating the Respondent's strict policy concerning the confidentiality of patient records. The Respondent's code of ethics states that the unauthorized disclosure of confidential information constitutes cause for disciplinary action. A copy of the code of ethics is given to each employee during orientation. In addition, the Respondent gives each employee a copy of its employee handbook, which emphasizes the importance of the confidentiality of patient information.[4]

Subsequently, by letter dated March 23, Nasby converted the 5-day suspension into a discharge. According to Nasby, the Hospital's code of ethics was violated in three respects; (1) disregard for patient confidentiality, (2) unauthorized removal of medical records, and (3) unauthorized disclosure of confidential information.[5] The Respondent's code of ethics states that such acts ''are considered proper causes for disciplinary action.'' Nursing Manager Barbara Schuyler testified that employees are told ''up front'' that they

[1] All subsequent dates are in 1993 unless otherwise indicated.

[2] The suspension letter dated March 8 informed Kongkasuwan that she was:

> suspended for three (3) work days and subject to discharge in accordance with Article XIV, Employee Discipline, Section A, for violation of hospital procedures, practices, and instructions. Due to the severity of these violations, severe disciplinary action is required. Therefore, the progressive discipline steps are being bypassed.

[3] Nasby testified that Kongkasuwan explained at the disciplinary hearing that other nurses had supplied her with the documents.

[4] The employee handbook states in relevant part:

> All employees are involved in the care of patients at your hospital. By your nearness to patients and their records, you may have access to information about these patients. Information about an individual or the health status of an individual in your hospital must be kept absolutely confidential. Request for information from outside sources should be channeled to the proper authorities in your hospital. Do not discuss patients with persons outside or inside the hospital except in meeting the needs of the patients. Also, do not discuss private information with the patients themselves.

[5] The Hospital's confidentiality policy specifically states that patient information is not to be disclosed to persons either outside or inside the Hospital except when meeting patient needs.

can be fired for breach of confidentiality, and that she personally informed Kongkasuwan of this policy.

On August 23, Kongkasuwan filed the instant charge. The October 7 complaint alleges that the Respondent violated Section 8(a)(1) by suspending and discharging Kongkasuwan because of her protected concerted activity or because it believed that she had engaged in protected concerted activity.

## II. THE JUDGE'S ANALYSIS AND THE RESPONDENT'S EXCEPTIONS

The judge found that Kongkasuwan was engaged in protected concerted activity. Although finding insufficient evidence of actual concerted activity, he concluded that the Respondent believed that Kongkasuwan had acted in concert with other employees, and that this belief motivated her discharge. The judge reasoned that the Respondent (1) increased the discipline imposed on Kongkasuwan after suspecting that she had obtained assistance from other employees, (2) threatened discharge of those employees, and (3) expressed extreme dissatisfaction with Kongkasuwan's involvement of fellow employees in her suspension.

The judge rejected the Respondent's *Wright Line*[6] defense that Kongkasuwan's activity was unprotected because she had violated the Hospital's rules regarding the confidential treatment of patient records. He found that she did no more than submit confidential records to the Hospital administration for the purpose of assessing the quality of health care given by its other employees. He emphasized that the patient records were used for internal Hospital purposes, that they did not leave the premises, and that they were never disclosed to any unauthorized personnel. He also stressed that the patients' names had been redacted, the records were used in a limited manner, and the records were only exposed to Hospital management, which already had access to them. Further, the judge stressed that the Hospital used similar patient records from Kongkasuwan's personnel file when initiating disciplinary action against her. Because the Hospital administration was able to refer to such documents for information relating to actions involving Hospital personnel, the judge found it inequitable to deny employees the same access, particularly where precautions were taken to prevent any breach of patient privacy. Thus, the judge concluded that the Respondent violated Section 8(a)(1) by suspending and discharging Kongkasuwan for engaging in protected concerted activity.

The Respondent excepts to this conclusion. It contends that there is no prima facie case because Kongkasuwan's breach of the Hospital's patient confidentiality rules is unprotected conduct. We agree. We further find that the Respondent satisfied its *Wright Line* burden of showing that, in any event, it would have discharged Kongkasuwan for lawful reasons.

## III. LEGAL ANALYSIS

As explained above, the Respondent has a strict policy prohibiting the disclosure of confidential patient records. Kongkasuwan knew that the documents she had received were classified by the Respondent as confidential. She was also aware of the Respondent's rule against unauthorized disclosure and dissemination of such information. In fact, Nursing Manager Barbara Schuyler testified that employees are told, when they commence employment, that they can be fired for breach of patient confidentiality. Schuyler personally informed Kongkasuwan of this policy.

Thus, upon acceptance of employment, Kongkasuwan agreed to abide by the Respondent's confidentiality policy. Notwithstanding this agreement, she breached this policy when she used the confidential records in a way that was clearly prohibited. The Respondent's rule provides that patient ''information is absolutely confidential.'' There is to be no disclosure ''to persons outside or inside the hospital except in meeting the needs of the patients.'' Kongkasuwan's use of the records was not related to ''patient needs''; her use of the records was solely related to her employment dispute with the Respondent. In these circumstances, the method and means by which Kongkasuwan made use of the Respondent's confidential patient records fell outside the protection of Section 7 of the Act. *Ridgely Mfg. Co.*, 207 NLRB 193, 196–197 (1973) (''employees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to their Employer's private or confidential records''). Accord: *Bell Federal Savings & Loan Assn.*, 214 NLRB 75, 78 (1974).

Concededly, there may be circumstances where the use of confidential records, in pursuit of an employment dispute, may be protected. The Board explained the law in *Altoona Hospital*, 270 NLRB 1179, 1180 (1984):

> It is undisputed that employers have a legitimate interest in keeping certain information confidential; that is unquestionably true with regard to a health care employer whose patient records are especially sensitive. An employee's violation of an employer's rule against the disclosure of confidential information may also be the subject of lawful discipline even when the disclosure is made for reasons arguably protected by the Act. The test of such discipline is whether the employee's interests in disclosing the information outweigh the employer's legitimate interests in con-

[6] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

fidentiality. If they do not, then discipline is lawful. [Citations omitted.]

In applying that balance to the instant case, we note initially the strong and compelling interest in protecting the confidentiality of patient records. On the other side of the balance, we note that employee Kongkasuwan could have used other channels to obtain the necessary information. More particularly, Kongkasuwan could have requested that her union, as exclusive representative, make an information request. The Act encourages this means of obtaining information as part of an effort to foster collective bargaining without denigrating legitimate confidentiality concerns. The Respondent and the Union, in the give-and-take of collective bargaining, could have explored ways to provide the necessary information without jeopardizing the Respondent's confidentiality interests. Kongkasuwan bypassed these established procedures and knowingly violated the Respondent's confidentiality policy by an unauthorized disclosure of the patient records.

Our dissenting colleague notes that Kongkasuwan deleted patient names from the records. However, the records contained patient identification numbers from which patient names could be ascertained. She also notes that outsiders (e.g., insurance carriers) have access to patient records. However, there is no showing that such access is, as here, without the consent of the Respondent or the patient.

Our dissenting colleague also suggests that a disciplinary proceeding is for the purpose of meeting patient needs, and thus Kongkasuwan, no less than the Respondent, was entitled to use the information. That argument misses the mark. Assuming arguendo that a disciplinary proceeding is for that purpose, the fact is that the Respondent's policy imposes restraints on *employee* usage, not on its own usage. Nor does this lead to inequity in the disciplinary proceeding. The collective-bargaining procedures, set forth above, are designed to prevent such inequity. Kongkasuwan chose to ignore those procedures.

Finally, our colleague argues that the patient information was disclosed only to management and union officials, and that they had a right to see and use the information because they were authorized to be present at the grievance hearing. We disagree. The fact that officials are authorized to participate in grievance procedures does not necessarily mean that each and every one of these officials must see and use sensitive materials. Decisions can be made to confine the materials to only a few officials. Management has the authority to determine which of its officials can see and use the information, and the collective-bargaining process will determine which union officials can do so. In any event, it was not up to employee Kongkasuwan to unilaterally make this delicate decision.

Based on the above, we conclude that the use of the confidential records was unprotected. Because this was the reason for the discharge, such discharge was privileged. Further, assuming arguendo that a reason for the discharge was the protected activity of seeking the assistance of other employees, we conclude that another reason was the use of confidential records and that the latter conduct, by itself, was sufficient to warrant the discharge. See *Wright Line.*

Accordingly, we dismiss the complaint in its entirety.

## ORDER

The complaint is dismissed.

MEMBER BROWNING, dissenting.

For the reasons explained below, I agree with the judge that the Respondent violated Section 8(a)(1) by suspending and discharging registered nurse Carol Kongkasuwan. In cases like this one, the Board applies the causation test enunciated in *Wright Line.*[1] Under that test, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct is a motivating factor in the respondent's action. Once this is established, the burden shifts to the respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.

I find, contrary to my colleagues and in agreement with the judge, that the General Counsel established a prima facie case that the Respondent suspended and discharged Kongkasuwan because it believed that she had engaged in conduct with other employees for mutual aid and protection. More specifically, the Respondent discharged Kongkasuwan after she had presented patient records that it believed she had obtained from other employees to assist her in challenging a prior suspension that was at issue during her disciplinary appeal hearing on March 16, 1993.[2] I agree with the judge that whether Kongkasuwan actually engaged in concerted activity to obtain these documents the Respondent believed that she had. This belief that she engaged in conduct with other employees for mutual aid and protection is sufficient to satisfy the ''knowledge'' aspect of the General Counsel's prima facie case. See *United States Service Industries*, 314 NLRB 30 (1994); *Monarch Water Systems*, 271 NLRB 558 (1984). Cf. *Respond First Aid*, 299 NLRB 167 fn. 13 (1990).

I also agree with the judge that the General Counsel established that Kongkasuwan's conduct was ''protected'' within the meaning of Section 7 of the Act. As the judge noted, Kongkasuwan used Hospital

[1] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[2] All subsequent dates are in 1993 unless otherwise indicated.

records only for internal purposes. There is no evidence that the records ever left the facility, and there was no disclosure of patient information to unauthorized individuals. Simply put, Kongkasuwan did not divulge information about patients to sources outside the Hospital, nor did she discuss private information with patients. I emphasize that Kongkasuwan was careful to delete the names of the patients from the documents she presented.[3] The documents were only shown to Hospital and union officials who had a qualified privilege to view them because they were present at the March 16 meeting. These officials could have reviewed them in any event had they chosen to do so.[4] In fact, the same sorts of patient records that Kongkasuwan produced were used by management during its consideration of Kongkasuwan's discipline, and the consideration of her discipline was the specific purpose of the appeal hearing.[5]

Thus, the information Kongkasuwan presented was material to her disciplinary hearing and related to work performance, it bore directly on the issue of disparate treatment, and it was directly related to ''terms and conditions of employment.'' Significantly, there has been no showing that Kongkasuwan purloined the documents. In sum, Kongkasuwan used the information in a manner consistent with the intent and purposes underlying the Respondent's patient confidentiality rules. I find her conduct protected.

The Respondent's animus, generated by its belief that Kongkasuwan had acted in concert for mutual aid or protection, is shown by the following facts: (1) Nasby's conversation with Union President Rue Hairston during which Nasby expressed displeasure that Kongkasuwan had involved other employees in her discipline; (2) Nasby's demand to know who had assisted Kongkasuwan by providing the information; (3) Nasby's questioning of licensed practical nurse Peggy Lester, as to Lester's involvement; and (4) Nasby's statement to Lester that employees assisting Kongkasuwan would be discharged.

In light of the foregoing, I conclude that the General Counsel established a prima facie case that Kongkasuwan's suspension and discharge were motivated by her protected conduct.

The burden thus shifts to the Respondent to prove by a preponderance of the evidence that it would have suspended and discharged Kongkasuwan even in the absence of her protected conduct. I conclude that the Respondent failed to satisfy its *Wright Line* burden. Rather, I find that the Respondent seized on the alleged breach of patient confidentiality as a convenient pretext to justify an unlawful discharge.

As shown below, a strong inference arises that the actual motivation for Kongkasuwan's 5-day suspension on March 16 and her eventual discharge on March 23 was the Respondent's belief that she acted in concert with fellow employees to challenge her original 3-day suspension. It was not until the Respondent suspected and accused Kongkasuwan of obtaining confidential documents with the help of other employees that it decided to institute more severe disciplinary measures. In fact, the Respondent's March 23 letter is devoid of any explanation why the 5-day suspension was converted to a discharge.

More importantly, the Respondent has not established that Kongkasuwan actually breached the rules that it relied on in discharging her. The reasons given by the Respondent in support of Kongkasuwan's discharge were her: (1) refusal to comply with facility policies and practices; (2) deliberate unauthorized removal of Hospital property; and (3) unauthorized disclosure of confidential information. The Respondent has failed to establish that Kongkasuwan failed to comply with Hospital policies.

While the Respondent's code of ethics specifically prohibits discussing patients with persons inside or outside the Hospital, Kongkasuwan did not engage in such conduct at the March 16 hearing. Instead, she attempted to raise circumstances related to the quality of health care given by other employees that would assist her in establishing that she should not have been disciplined. The Employer's confidentiality policy specifically allows disclosure of patient information within the Hospital in order to meet patient needs. Just as the Respondent's use of patient information to support its disciplinary action against Kongkasuwan was for the purposes of fostering quality patient care and thus meeting the needs of the patients, so too did Kongkasuwan act in furtherance of patient needs by using the records to defend her performance of tasks directly related to patient care.

With respect to any unauthorized removal of property, there is no evidence that Kongkasuwan removed any Hospital records. Rather, she was an innocent beneficiary of assistance from others.

[3] While patient identification numbers may have still appeared on the documents, anyone who could have gleaned a patient's name through use of these numbers would presumably have had legitimate access to the documents in any event.

[4] Moreover, although not mentioned by the judge, the Respondent's personnel director, Edna Nasby, admitted that these same types of patient records are reviewed by insurance carriers, by outside counsel, during doctor peer reviews, and for educational purposes.

[5] In relying on this consideration as a factor in finding that Kongkasuwan's activity is protected, I recognize that Hospital management may have legitimate reasons for denying employees the same access to such patient records as management had. Thus, I do not rely on the judge's suggestion that management itself breached its confidentiality policy by making certain confidential records part of Kongkasuwan's personnel file. Similarly, I do not rely on the judge's suggestion that if management denied employees the same access to such records as management had, the policy would be inherently unfair.

Finally, the Respondent has failed to establish any unauthorized disclosure of confidential information. As explained above, Kongkasuwan used the records for internal Hospital purposes. There was no evidence that they ever left the Hospital. Further, the information was only disclosed to individuals who had access to such information in any event. This information was ''disclosed'' only to individuals who already had the right to see and use the information by virtue of their participation in the contractual grievance procedure—i.e., the Respondent's officials and Kongkasuwan's union representatives, who were all authorized to be present at the hearing on her grievance. Thus, the Respondent's confidentiality claim here rings hollow because there was no disclosure to ''unauthorized'' persons within the meaning and purpose of the Respondent's patient record confidentiality policy. The Respondent's legitimate confidentiality interests were never in jeopardy as a result of Kongkasuwan's use of the information which had come into her possession.

In finding Kongkasuwan's conduct to be unprotected, my colleagues assert that, instead of using documents which had come into her possession, Kongkasuwan should have requested that the Union attempt to obtain the information from the Respondent on her behalf. I disagree. The issue here is whether Kongkasuwan was engaged in protected activity for which she was discharged, not whether she had alternative means of obtaining the information necessary to contest her 3-day suspension. That Kongkasuwan could have asked her bargaining representative to make an information request did not preclude her from utilizing documents which had been made available to her by another source, particularly because the Respondent has not shown that Kongkasuwan's use of those documents was inconsistent with the Hospital's confidentiality policy. Indeed, by asserting that Kongkasuwan should have asked her union to make an information request for the documents, my colleagues in the majority clearly contemplate that the Respondent would be compelled to produce them. In that event, the documents would have been seen by exactly the same people who saw them pursuant to Kongkasuwan's disclosure.

Nor has the Respondent shown that a breach of patient confidentiality, if any, would have induced it to discharge Kongkasuwan. The Respondent produced no evidence that it discharged other employees for similar conduct or that Kongkasuwan's conduct merited discharge under established Hospital policy. In these circumstances, I conclude that the Respondent seized upon the alleged breach of patient confidentiality as a pretext and has failed to prove that Kongkasuwan would have been discharged even in the absence of her protected conduct. Accordingly, I find merit in the 8(a)(1) complaint allegation and would order reinstatement and backpay.

*Donald A. Becher, Esq.*, for the General Counsel.
*Stephen A. Weber, Esq. (Kay, Casto, Chaney, Love & Wise)*, of Charleston, West Virginia, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Beckley, West Virginia, on June 16, 1994. Upon a charge filed on August 23, 1993, by Carol Kongkasuwan, a complaint issued on October 7, 1993, as amended on December 7, 1993. It alleges that Beckley Appalachian Regional Hospital (the Respondent or Hospital) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by suspending and discharging Kongkasuwan because she had engaged in protected concerted activities. The Respondent filed an answer which admitted the jurisdictional and supervisory allegations in the complaint and which denied the commission of any unfair labor practices.

On the record as a whole, including my observation of the witnesses and the briefs filed by the General Counsel and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Beckley Appalachian Regional Hospital, the Respondent, has been engaged in the operation of a hospital providing inpatient and outpatient medical care at Beckley, West Virginia. With gross revenues in excess of $250,000 and with purchases and receipts of goods in excess of $50,000 directly from points outside the State, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The West Virginia Nurses Association (the Union) is admittedly a labor organization within the meaning of Section 2(5) of the Act.

Personnel Manager Edna C. Nasby, Manager of Nursing Service Barbara Schuyler, and Director of Behavioral Science and Psychiatry John Hodack,[1] are admittedly supervisors within the meaning of Section 2(11) of the Act.

#### II. THE FACTS

The charging party, Carol Kongkasuwan, is a registered nurse who was assigned to the Behavioral Science Center of the Beckley Appalachian Regional Hospital. The registered nurses are represented by the West Virginia Nurses Association. In early March 1993, Respondent's personnel manager, Edna Nasby, became aware of an incident involving Kongkasuwan. The incident report, dated March 3, 1993, dealt with a defective intravenous (IV) procedure on a patient. (R. Exh. 1.) Following an investigation by management personnel, Nasby decided that a disciplinary hearing should be scheduled for March 5, 1993. Several other work infractions were also discussed, including the IV incident, her misspelling of a drug on a report, and the untimely completion of her work. By letter of March 8, 1993, Nasby informed Kongkasuwan that she was suspended for 3 days ''for violations of hospital

[1] John Hodack appears as ''Houdac'' in the record.

procedures, practices, and instructions.'' (G.C. Exh. 2, Tr. 59–60.) In her assessment of the discipline, Nasby relied on various documents which are contained in Kongkasuwan's personnel file, such as memoranda from supervisory nurses, progress notes, incident reports, and forms dealing with intravenous treatment or physician's instructions. (Tr. 24, G.C. Exhs. 4–9.) Several documents were forms dealing with patient care although the patients' names were redacted or blackened out. (Tr. 20.)

Kongkasuwan appealed the suspension. The meeting was scheduled for March 16, 1993. In the meantime, she had obtained certain documents, including patient records, which showed that other nurses had committed similar infractions without incurring any discipline. (G.C. Exhs. 10–12, Tr. 30–31.) Nasby became aware that Kongkasuwan had sought the aid of other employees about her suspension. (Tr. 26.) During a telephone conversation with Rue Hairston, president of the Union, Nasby expressed her concern and displeasure that Kongkasuwan had involved other employees in her discipline problem. (Tr. 25.) It was reported to Nasby that Kongkasuwan had met and been seen with Peggy Lester, a licensed practical nurse. (Tr. 27–28.)

The March 16 hearing was attended by Union President Hairston, Kongkasuwan, several hospital officials including the assistant administrator, and Nasby. She explained the reasons for the suspension, including the ''IV'' incident, the misspelling of a drug, and the time problem. Nasby also expressed her concern that other employees had became involved in this issue. (Tr. 30–31.) Kongkasuwan defended her conduct and offered examples of other employees' misconduct. She presented the documents which, according to her own testimony, were provided to her by other persons. (G.C. Exh. 10–12, Tr. 106.) Nasby described these documents as ''medical information obtained out of the patient's chart, EKG, progress notes from the RN's, a daily medication report, lab report,'' and others on which the patients' names were obliterated. (Tr. 63–64.) Nasby testified that Kongkasuwan explained at the hearing that she had obtained those documents from other nurses. (Tr. 31.) Nasby therefore interrupted the meeting and questioned the employee (Tr. 68):

> I stopped the meeting and asked Ms. Kongkasuwan how many copies she had, [of] how many patients she had records, how did she get those, how did she get that information.
>
> There was no response at all . . . she did say that an RN and an LPN helped her.

Kongkasuwan refused then and now to reveal the names of anyone who had provided the information. (Tr. 32, 106.) The documents concerning the three incidents of misconduct revealed one where a nurse who had overdosed a patient with drugs was not disciplined, another incident where the Hospital tolerated a misspelling of a drug and other mistakes by an employee without discipline, and a third incident where an RN took certain actions involving a patient (heparin lock and flush) without a physician's order and was not disciplined. (G.C. Exhs. 10–12.) The names of the patients were obliterated.

Demanding to know who had assisted her in providing the information and specifically inquiring whether Peggy Lester helped her, Nasby concluded the meeting after Kongkasuwan refused to reveal the identity of the individuals.

By letter of March 16, 1993, Nasby informed Kongkasuwan that she was suspended for 5 days for violating several sections of the Hospital's personnel policies. (G.C. Exh. 13.) By letter of March 23, 1994, Nasby converted the suspension into a discharge. (G.C. Exh. 14.) According to Nasby, the hospital policy or code of ethics was violated in three respects: (1) disregard for the confidentiality of the patients; (2) unauthorized removal of medical records; and (3) unauthorized disclosure of confidential information. (Tr. 73–74.)

The General Counsel argues that Kongkasuwan was discharged because of her ''use of information that it [Respondent] believed she had obtained from other employees to assist her in challenging discipline'' or ''conduct with other employees for her mutual aid and protection'' in violation of Section 8(a)(1) of the Act.

The Respondent argues that the Charging Party had obtained copies of patients records which revealed confidential patient information in violation of company policy.

## Discussion and Conclusions of Law

The parties basically agree that the Charging Party may have engaged in concerted activities with other employees of the Hospital, but that the record is not clear on this issue. Kongkasuwan declined to reveal the names of the other individuals who helped her during her tenure at the Hospital, and the General Counsel has made it clear that ''the names of any other co-workers involved with production of document'' be excluded and be kept confidential. (Tr. 10–12.) Indeed, when Kongkasuwan was interrogated by Respondent's counsel about the identity of the persons who aided her during the investigation, the General Counsel objected. (Tr. 107.) The record shows that the Respondent threatened to discipline or even discharge these employees. (Tr. 45–46, 68–69.) I upheld the objection. The Respondent is, accordingly, correct in arguing that there is insufficient evidence in the record that the Charging Party actually acted in concert with other employees.

Nevertheless, the General Counsel argues that the Respondent violated the Act, because the discharge was based on Respondent's belief that Kongkasuwan had acted in concert with other employees. The Respondent correctly understood this argument, paraphrasing ''even if Kongkasuwan did not actually engage in concerted protected activity with the co-workers, BARH terminated her because it thought she had.'' (R. Br., p. 11.)

In this regard, the record supports the General Counsel. Kongkasuwan had faced a 3-day suspension for work related problems. Not until management suspected her and accused her of obtaining confidential documents with the help of other employees, did it decide to discharge its employee. Nasby threatened those who had assisted Kongkasuwan with discipline, possibly discharge. Nasby admittedly conveyed to the union president, to employee Lester, and to everyone at the meeting her extreme dissatisfaction with Kongkasuwan's involvement of fellow employees in her suspension. (Tr. 25–28, 30–32.) Nasby questioned Lester about her association with Kongkasuwan. (Tr. 45):

> Edna asked if I knew who was helping Carol. That Carol had not done that alone. They would find out who it was.

In short, the Respondent was convinced that Kongkasuwan had received the assistance of other employees and concluded that she had acted in concert with them.

Most of the documents which Kongkasuwan had obtained and which she presented to management officials during the March 16 meeting were internal hospital records. These are considered confidential because they contain patient information. Even though the patient's names had been blackened out, any employee in the Hospital with access to a computer could have ascertained the patient's name. However, a person not connected with the Hospital would have been unable to gain access to a patient's information with the information contained in these documents. (Tr. 94.) Accordingly, so argues the Respondent, even if Kongkasuwan's activity was concerted it was not ''protected,'' because it violated company rules of confidential treatment of patient information. For the reasons cited in its brief, it would indeed be difficult to justify the breach of confidentiality or the purloining of hospital records and then to classify such conduct as ''protected.''

Under the circumstances here, however, the Charging Party's conduct was protected for a number of reasons. The hospital records were used for internal purposes, there is no evidence that they ever left the confines of the facility, and there is no evidence that there was a breach of confidentiality or a disclosure of patient information to an unauthorized person or to any party not connected with the Hospital. Moreover, the patient's names were obliterated, so that anyone not connected with the facility would be unable to use any confidential information. And hospital personnel with access to computers would have access to patient information in any case. In short, the hospital records at issue here were used in a very limited way and were exposed to hospital management which already had access to such information.

Significantly, the Hospital used the same type of information, i.e., hospital records which reveal patient information for the purpose of its initial personnel action against Kongkasuwan and those hospital records were contained in her personnel file. Respondent's counsel argues that the hospital administration should be able to ''refer to confidential patient documents in assessing the quality of health care given by its employees'' without risking ''its employees from reviewing patient information whenever they feel a need to do so as a defense to disciplinary action.'' (R. Br., p. 21.) Such an argument is equally applicable to Kongkasuwan who did no more than submit to the hospital administration confidential records for the purpose of assessing the quality of health care given by its other employees. And if those documents are so sacrosanct that they should not have been used for personnel actions, then it was management which breached the privilege first by making such records a part of Kongkasuwan's personnel file. In either case, the information was used for ''management'' purposes. To suggest that the hospital supervisors should have access to such information while denying employees the same right would render the policy inherently unfair, particularly where the employee has taken the same precautions against disclosure by redacting the patients' names. The prohibition against disclosure of confidential patient information would appear to apply equally to supervisors or management employees and regular employees.

I accordingly find that the employee conduct here was not only concerted but also protected by the Act. Respondent's conduct in suspending and discharging Kongkasuwan' for engaging in protected concerted activity violated Section 8(a)(1) of the Act. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully discharged Carol Kongkasuwan, the Respondent shall offer her reinstatement and make his employee whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]